SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1546

PHILLIP MANZELLA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Illinois entered in this cause on November 30, 1973.

OPINION BELOW

The opinion in the Supreme Court of Illinois (Appendix "A", infra) was entered on the 30 day of November 1973. A timely petition for rehearing was denied on January 15, 1974. This petition is filed within 90 days of final order of the Illinois Supreme Court denying the Petition for rehearing. The jurisdiction of this court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Was the Petitioner denied his Sixth Amendment Rights to confrontation of witnesses when the court sustained the State's objection to the defendant asking a material witness her present address especially when the witness said she was not in fear for her life?

2. Was the due process provision of the Fourteenth Amendment satisfied when the Illinois Supreme Court, which provides for appeals for criminal convictions, totally ignored one of the material issues raised by the petitioner on appeal?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . Nor shall any state deprive any person of his life, liberty, or property, without due process of law; . . ."

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions the accused shall enjoy the right—to be confronted with the witnesses against him; . . ."

RULES INVOLVED

Rule 603 of the Supreme Court Rules of the Supreme Court of Illinois reads as follows:

> "Appeals in criminal cases . . . by defendants from judgments of the Circuit Courts imposing the sentence of death shall lie directly to the Supreme Court as a matter of right."

STATEMENT

Your Petitioner, Phillip Manzella was indicted for the murder of his sisters-in-law, Coleen Mulcahy and Claudia Daubenspeck and of the attempt murder of his former wife, Candance Mulcahy Shell. At the conclusion of the trial he was found guilty, and upon recommendation of the jury was sentenced to death on the two homicides and was sentenced to the Illinois State Penitentiary on the attempt murder. A direct appeal was taken to the Illinois Supreme Court and although the sentence imposing death was reversed, the convictions were affirmed. During the course of the trial the State's evidence indicated that the shooting took place in the home of the petitioner's ex-wife and she was the only witness to the shootings. In order to establish the guilt of the defendant the State called one Diane Drobut. She testified that on the morning after the shootings she accompanied the defendant to Mexico which would indicate an immediate flight from the jurisdiction of the State of Illinois. On cross-examination of Miss Drobut the defense attorney asked her address and an objection to the question was sustained by the Court.

The defendant in his own testimony said that he did not leave for Mexico until three or four days after the shoot-

ings; that he had been in Wisconsin looking for some property on the day of the crime and upon reentering the Chicago area learned he was wanted and also learned that the police were going to shoot him on sight. He then left the jurisdiction. On re-direct examination of Miss Drobut she admitted that she was not in fear of her life in anyway.

During the course of the trial evidence was introduced that the defendant on occasions prior to the date of the crimes struck his ex-wife and further on one occasion struck his exwife's girlfriend who was not a named victim in the indictment upon which the defendant was tried. Your Petitioner raised the question of the propriety of evidence of other unconnected crimes with a non-victim and cited Illinois law supporting his position. The Illinois Supreme Court in its decision elected to decide the issue of the strikings of the victim as being substantial or plain error but held against the petitioner on the grounds that prior assaults on the victims by the defendant tended to throw light on the intention of the defendant. However, the court totally ignored the defendant's contention that evidence of a striking of a non-victim a week before the date of the alleged crime was irrelevant and highly prejudicial. (A copy of the petitioner's brief in the Illinois Supreme Court raising that issue is attached hereto as Appendix B).

REASONS FOR GRANTING THE WRIT

I.

THE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION OF WITNESSES.

Diane Drobut was called by the State to establish a very material fact—the immediate flight of the defendant from the Chicago area after the crimes charged. Miss Drobut testified that she met the defendant on December 4, 1967, and that they left with another person on that date for Mexico.

During cross examination by the defense lawyer, the following took place:

> "Q. Where do you live, Miss Drobut?
>
> MR. WALSH: Objection, Judge, and I will ask to be heard at side bar.
>
> THE COURT: The objection will be sustained."

The defendant testified that he did not leave the Chicago area until the 7th or 8th of December, only after learning that he was wanted for the crime and that police were going to kill him on sight. He further testified that Miss Drobut was lying about the fact that he fled on the day immediately following the killing. It has become well settled law that the address of a witness is esesntial in cross examination of that witness. In *Alford* v. *United States*, 282 U.S. 687, 75 L. Ed. 624, 51 S. Ct. 218, this Court in a unanimous decision reversed a conviction where the trial judge sustained objections to questions by the defense seeking to find out the place of residence of certain prosecution witnesses. The court there held:

"It is the essence of a fair trial that reasonable latitude be given to the cross examiner, even though he is unable to state to the court what facts a reasonable cross examination might develop. Prejudice ensues from a denial of an opportunity to place the witness in his proper setting and put the weight of his testimony, his credibility to a test without which the jury cannot fairly appraise them . . .

"To say that prejudice can be established only by a showing that the cross examination, as pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial . . .

". . . The question 'Where do you live?' was not only an appropriate preliminary to the cross examiner of the witness, but on its face, . . . was an essential step in identifying the witness with his environment, to which cross-examination may always be directed."

In *Smith* v. *Illinois,* 390 U.S. 139, 88 S. Ct. 748, 19 L. Ed. 2d 956, this Court reversed an Illinois conviction when the defendant was denied the right to ask prosecution witness either his name or where he lived. The court there held that the witness' name and address could open countless avenues of in court examination and out of court investigation and to forbid this most rudimentary inquiry at the threshold is "effectively to emasculate the right of cross examination itself." This case was cited by the Illinois Supreme Court in the instant case.

In *People* v. *Shaw,* 117 Ill. App. 2d 16, 254 N.E. 2d 602, the Appellate Court was faced with the following situation. The defendant was denied the right to knowledge of the address of the prosecution witness. The Appellate Court affirmed the conviction in *People* v. *Shaw,* 89 Ill. App. 2d 285, and a motion for reconsideration of that af-

firmance in light of *Smith* v. *Illinois*, supra was denied. This Court granted a writ of certiorari, vacated the judgment of the Appellate Court of Illinois and remanded the case for further consideration in light of *Smith* v. *Illinois*. On said reexamination the Appellate Court of Illinois reversed and remanded the *Shaw* conviction based on *Alford* v. *U.S.*, supra and *Smith* v. *Illinois*, supra. At about the same time in *People* v. *Hall*, 253 N.E. 2d 890, the Appellate Court of Illinois, First District, reversed a conviction where the question of the defense attorney seeking the residence of the witness was objected to and the objection was sustained. The Court cited *Smith* and *Alford*, supra in support of its reversal.

People v. West, 3 Ill. App. 3d 106, 278 N.E. 2d 233, the same situation occurred except, that the witness refused to give his address and the trial court upheld his refusal. *Alford* and *Smith* again were the basis of the reversal.

For all we know, Miss Drobut could have been living in a brothel which would have affected her credibility or she may have been living in a community where her reputation for truth and veracity was very poor. She may have told her neighbors or the persons with whom she lived a tale different than what she told on the witness stand. She may have been living outside of Chicago and brought in at State expense which again would have affected her credibility. All these can be considered the "countless avenues of inquiry" which this Court spoke of in reversing the conviction in *Smith* v. *Illinois*, supra.

The State is in no position, furthermore, to argue that an exception to the *Smith* v. *Illinois* and *Alford* v. *U.S.*, rule is that the witness was in fear of the defendant and therefore could justifiably withhold her address from

him. See: *U. S.* v. *Palermo,* 410 F. 2d 468 and *U.S.* v. *Varelli,* 407 F. 2d 468. Those cases held that under certain circumstances a prosecution witness could withhold information as to his address when it is shown that his life or safety would be endangered by the exposure of that information. In this case, however, on redirect examination the State established beyond any doubt whatsoever that the witness was not in fear of her safety. The prosecutor made that patently clear in redirect by asking:

"Q. Miss Drobut, do you now fear for your own safety?

A. No."

Your petitioner was cut off at the threshold of cross examination of a very material witness of information which could have led to further cross examination which may very well have destroyed the credibility of this witness and we can only speculate as to what the trier of fact would have done had this witness' credibility been destroyed. Cross examination, called by Wigmore the greatest machine by man for the discovery of truth, cannot be so lightly put aside and the ruling below is a serious deprivation of the right of cross examination guaranteed by the Sixth Amendment to the United States Constitution.

That the Sixth Amendment right of confrontation of witnesses is applicable to the State is well settled. *Pointer* v. *Texas,* 380 U.S. 400 (1965). This Court reecntly considered the question of effective confrontation of witnesses in the case of *Davis* v. *Alaska,* 14 Cr. L. 3117 (February 27, 1974). There the court held:

"Cross examination is the principal means by which the believability of a witness and the truth of his

testimony are tested subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation. The cross examiner is not only permitted to delve into the witness' story to test the witness' perceptions and manner, but the cross examiner has been traditionally allowed to impeach, i.e., discredit the witness."

The Sixth Amendment right to confrontation of witnesses was held in *Davis,* supra, to mean more than just physically facing the witness.

The Court in reversing the conviction in *Davis* for denial of his Sixth Amendment right to confrontation cited *Alford* and *Smith,* supra, in support of its ruling. The Supreme Court of Illinois improperly considered Diane Drobut's testimony to be of an inconsequential nature and further missed the point by holding that the defendant's 'investigatory rights were not impinged upon.

This Court should grant the petition and reverse the conviction herein to cure this constitutional error of the first magnitude.

II.

THE DEFENDANT WAS DENIED DUE PROCESS OF LAW WHEN THE ILLINOIS SUPREME COURT TOTALLY IGNORED A MATERIAL ISSUE RAISED ON APPEAL BY THE DEFENDANT.

Rule 603 of the Rules of the Supreme Court of Illinois allows for appeals in a case involving a death sentence directly to the Supreme Court as a matter of right.

During the course of the trial the State introduced evidence that on a date approximately one week before the death of the victims, defendant punched the girlfriend

of his ex-wife in a cocktail lounge on the northwest side of Chicago. There are a line of Illinois cases which hold that evidence of a separate and distinct crime regarding assaults against someone other then the vitcim of the crime is inadmissible and introduction of such evidence reversible error. *People* v. *Scott,* 52 Ill. 2d 432, 288 N.E. 2d 748; *People* v. *Kowalski,* 332 Ill. 167, 163 N.E. 399; *People* v. *Sterankovich,* 313 Ill. 556, 145 N.E. 172; *Brom* v. *People of the State of Illinois,* 216 Ill. 148, 74 N.E. 790. Notwithstanding the fact that the court decided the issue of whether the striking of a victim was proper the court ignored the issue raised that evidence of the striking of a non-victim at a time and place separate and distinct from the incident alleged in the indictment was error. The ignoring of the question, was brought to their attention in a petition for rehearing (which is attached hereto as Appendix "C"), but the petition was denied.

When the Supreem Court of a State provides for an appeal from a criminal conviction it is a violation of due process to not decide a properly raised appellate question. *Cole* v. *Arkansas,* 333 U.S. 196 (1948). *Frank* v. *Mangum,* 237 U.S. 309. In *Griffin* v. *Illinois,* 351 U.S. 12 (1956) this court held that due process and equal protection of the law were applicable to state Appellate procedures as well as state trial procedures and that where the state does provide for review of criminal judgments that review must be applied equally to all appellants.

We submit that the Illinois Supreme Court denied full appellate rights to your petitioner. The severity of the crime and the heavy sentence may have caused the court to overlook a valid appellate contention of your petitioner which in turn denied him due process of law. Due process must be and is afforded to all guilty or innocent, accused felons or misdemeanants.

If the highest courts of the individual States are allowed to choose which point of which appeals it will decide and ignore those points which might require a reversal in a sensitive case, then all our rights are in jeopardy, and the right to appeal means nothing.

CONCLUSION

For the above and foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Docket No. 45215—Agenda 10—May, 1973.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. PHILLIP MANZELLA, Appellant.

MR. JUSTICE DAVIS delivered the opinion of the court:

This is a direct appeal from the circuit court of Cook County, which, after a jury trial, adjudged the defendant, Phillip Manzella, guilty of the murder of his two sisters-in-law, Colleen Mulcahy and Claudia Daubenspeck, and of the attempted murder of his former wife, Candace Mulcahy Shell. Pursuant to the jury's recommendation, the trial court sentenced the defendant to death for the murders, and to a term of years in the Illinois State penitentiary for the attempted murder, the minimum of which is conflicting in the common-law record, wherein it is recited to be from 10 to 20 years, and in the report of proceedings, wherein it is recited to be from 15 to 20 years.

The judgment below must be remanded because of the imposition of the death sentence. In accordance with the determination of the United States Supreme Court (*Furman* v. *Georgia* (1972), 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726; *Moore* v. *Illinois* (1972), 408 U.S. 786, 33 L. Ed. 2d 706, 92 S. Ct. 2562) that the death penalty which juries are authorized to impose in capital cases under statutes such as those in Illinois is violative of the constitution of the United States, we have affirmed the convictions, but vacated several such sentences and remanded the causes to the various circuit courts with directions to conduct a hearing in aggravation and mitigation, and to resentence the defendant to a sentence other

than death. (*People* v. *Speck* (1972), 52 Ill. 2d 284; *People* v. *Newbury* (1972), 53 Ill. 2d 228; *People* v. *Clark* (1972), 52 Ill. 2d 374.) We likewise so direct in this case.

However, in addition to remanding for resentencing, we also find it necessary to consider certain errors that were allegedly committed during trial which the defendant contends require reversal. We disagree.

To more fully understand these errors, it is necessary to review the pertinent facts as adduced at the trial. The defendant's former wife, Candace, testified that on December 4, 1967, the defendant, Phillip Manzella, rang the doorbell of her apartment; that she was still awake and was watching television with her sisters, Claudia and Colleen; and that after she looked out the front window and recognized the defendant's car, the women decided to let him into the apartment, believing that because of their number, they were safe. Before entering the apartment, however, Candace searched the defendant's pants and coat pockets for a weapon, and found none.

After admitting him to the apartment, the three women went into the kitchen with the defendant where they had a conversation with him concerning his statements that Colleen was on dope and smoking marijuana at the school she attended. After ten minutes of this conversation, Claudia ordered the defendant out of the house and told him that he should never return. He agreed to leave, but before doing so, he turned and said: "But before I go, I've got something for you," and then shot Claudia, Colleen and Candace. The shots killed Claudia and Colleen immediately, but Candace was neither killed nor rendered unconscious. She recognized muffled sounds as footsteps coming towards her, and then before losing consciousness, felt a heavy object pounding on her head.

When Candace revived, she saw her sisters lying on the floor motionless. She arose and made her way to the front door, tried to get out, and discovered that the key needed to unlock the door was missing. She then became aware of somebody standing behind her, and when she turned, saw the defendant holding a knife that had been hanging in the kitchen. Manzella attempted to stab her; she tried to push him away but instead fell to the floor. The defendant then stabbed her in the back and she again lost consciousness.

When she regained consciousness she realized she was very weak and could barely breathe. Despite great difficulty in walking, she made her way to her mother's bedroom. She turned on the light and said to her: "Where is he?" Her mother, being deaf, had slept through the shooting and screaming. When her mother answered "Where is who?" Candace said, "Phil, he killed them."

Candace became frightened at the thought that Manzella might still be in the house, and she went into another bedroom and shut the door. Her mother got up to go after her, but then noticed her grandson and little granddaughter going into the kitchen. She thought that the defendant might still be in the house so she took the grandchildren with her to the bedroom where Candace was. Candace unlocked the door to let them in, then went into the closet to hide. However, her mother helped her out and onto the bed. Candace then called the telephone operator and related what had happened. Her mother noticed the knife protruding from Candace's back and was able to pull it out. She recognized the knife, even with the handle broken off, as having come from her kitchen set.

Candace met the first policeman to arrive at the door. He observed her bleeding from the head and back, and saw the two bodies lying in the kitchen with blood issuing from

the head of each. Candace was then removed to the hospital.

Additional testimony on direct examination of Candace elicited that there had been a series of incidents following her divorce in which the defendant had harrassed her by following her, physically abusing her, and attempting to frighten her. She also testified that in mid-July of 1967 he entered her home at 2 A.M., wearing a disguise and claiming to be a killer hired by Phillip Manzella to shoot his ex-wife; that the disguise was so poor that the entire family recognized the intruder as the defendant, Manzella; that nevertheless, he kept the family at bay for two hours with a snub-nose revolver; that after he left, the police were called; and that charges, which were filed three days later, were eventually dropped.

She also described another occurrence which took place about a month before the shooting incident out of which the murder charges arose, at which time she and the defendant got into an argument in a lounge and at which time he punched her girl friend, Arlene Soper Niemiec, in the jaw, and subsequently hit Candace and knocked her down. The girl friend also testified relative to that incident.

The defendant testified in his own behalf and denied that he had been in his former wife's apartment on the night of December 4, 1967. He asserted that he went to Wisconsin and Minnesota that night to look at land and learned of the deaths on his return; and that he then went to Mexico because he thought the Chicago police were going to kill him. He denied all the material statements made by the State's witnesses, and stated that Candace lied when she said she saw the defendant with a gun in July, 1967; that Dominic Romano lied when he said he saw him with a gun in December, 1969; that Richard Niemiec lied when he said he saw the defendant with a gun in the middle of

November, 1967; that Diane Drobut lied when she said she met the defendant on December 4, 1967; that Officer Vaquez lied when he said the defendant tried to escape from jail, and that Arlene Niemiec lied when she said the defendant had slapped her. However, he admitted that he lied to custom officials about his true identity.

The court instructed the jury that the "State is not required to prove a motive for the commission of the crime charged." Defense counsel at first objected to this instruction but then acceded to it on condition that the prosecutor not argue motive to the jury. The prosecutor nevertheless commented on the July, 1967 incident which was not closely connected in point of time with the events of December, 1967, which give rise to this proceeding.

The first of the three errors which the defendant urges was that he was denied his right of cross-examination when the court sustained the State's objection to the defense questions seeking the address of the witness, Diane Drobut. Diane testified that she met with the defendant and Louie Havier on December 4, 1967 and that she had spoken with the defendant's attorney outside the courtroom prior to her testimony.

In the case at bar, there was no showing of personal danger to the witness, Diane Drobut, whose address was asked. In fact, the State established on redirect examination that there was no danger to her personal safety. The record indicates that the testimony of this witness was of a noncritical character, and additionally, in view of the relationship between the defendant and the witness, any claim that the denial of information concerning her address deprived the defendant of investigation apparently is without merit.

The record reveals that defense counsel was allowed to question Diane Drobut with reference to her place of employment; where she had lived prior to going to Mexico; with whom she lived while in Mexico; and why she left the person with whom she was originally staying there. From the answers to these questions, the jury learned that she had worked at a restaurant in the Executive House; that she had lived at home, but stayed with Louie Havier a couple of times at the Southwest Inn; that she lived with the defendant for about a month in Mexico; that she left Havier and went to live with the defendant when the defendant told her that Havier was going to put her "on the white slave market"; and that she was testifying because she was subpoenaed.

It thus appears that the court allowed the defendant to cross-examine Diane Drobut on a wide spectrum and that he was not thwarted in his in-court examination or out-of-court investigation.

It is well established that the address of a witness must be given on inquiry, unless to do so would jeopardize the personal safety of the witness. (*Alford* v. *United States* (1931), 282 U.S. 687, 75 L. Ed. 624, 51 S. Ct. 218; *Smith* v. *Illinois* (1968), 390 U.S. 129, 19 L. Ed. 2d 956, 88 S. Ct. 748.) In *Smith,* the court, in considering this issue stated:

> "Yet when the credibility of a witness is an issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." (390 U.S. at 131.)

Also see: *United States* v. *Palermo* (7th Cir. 1969), 410 F. 2d 468, and *United States* v. *Varelli* (7th Cir. 1969), 407

F. 2d 735, where in both instances the court held that the address of a witness should have been disclosed. However, in the light of the circumstances in this case, we believe that the ruling of the trial court in sustaining this objection was harmless beyond a reasonable doubt. There is no showing in the record of any prejudice to the defendant because of this ruling.

At the time the police were conducting their investigation into the murder, and preserving evidence, the defendant was meeting with Diane Drobut and Louie Havier, and the three of them drove immediately to Mexico City. Miss Drobut testified that Manzella was introduced to her as "Ken Oligney"; that she learned who he was after crossing the border; and that she lived in Mexico with him for about a month before she returned to the United States and she visited him at the Cook County jail at his mother's request. When Diane Drobut was asked her address on cross-examination, the State's objection to the question was sustained. On redirect examination by the State, it was established that the witness was not in fear for her safety.

The second error asserted by the defendant was the introduction of evidence of prior and distinct offenses committed by the defendant. The State contends that this evidence was proper to show malice, motive and intent on the part of the defendant. We note that defense counsel failed to object to the introduction of this evidence during the trial, and normally this would preclude raising this objection on appeal. (*People* v. *Thompson* (1971), 48 Ill. 2d 41, 45-46; *People* v. *Wilson* (1970), 46 Ill. 2d 376, 382.) However, where the magnitude of the error may result in substantial prejudice to the right of the defendant to a fair trial, we have nevertheless on proper occasions considered the error as though it had been properly preserved for appeal.

Supreme Court Rule 615(a) (50 Ill. 2d R. 615(a)) provides:

> "*Insubstantial and Substantial Errors on Appeal.* Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."

In view of this rule, we will consider the second alleged error urged herein, even though no objection was raised thereto at the trial.

The rule of evidence which precludes the introduction of evidence concerning offenses other than that for which an accused is being tried is fundamental to a fair trial. This rule requires no further elaboration. It is true, nevertheless, that evidence relevant to the main issue, and which serves to place the defendant in proximity to the time and place of the offense and which aids or establishes identity, and tends to prove design, motive, or knowledge, is admissible as an exception to the general exclusionary rule barring such evidence. (*People* v. *Wilson* (1970), 46 Ill. 2d 376; *People* v. *Dewey* (1969), 42 Ill. 2d 148.) In *Dewey,* at page 157, we stated:

> "The defendant next contends that the trial court erred by allowing the introduction of evidence that defendant attempted to pick up girls of the same age as Susan Brady in his car on prior occasions. It is argued that such testimony of misconduct with other young girls deprived the defendant of his constitutional right to presumption of innocence. Evidence which tends to prove a fact in issue is admissible even though it discloses that the defendant committed another crime, and evidence which establishes motive, intent, identity, accident or absence of mistake is admissible even though it may also involve proof of a separate offense."

Thus, prior assaults on Candace by defendant and prior threats against her and Claudia by the defendant were relevant to the offenses at issue, as tending to throw light on the intention of the defendant. Also, the evidence of the battery committed on Candace by the defendant went to the issues of malice and criminal intent and such evidence was admissible against him.

The incidents in question were not so remote as to make them inadmissible. In *People* v. *Griswold* (1950), 405 Ill. 533, this court held that an occurrence many months prior in time was not too remote. Also, evidence of other offenses is admissible if relevant for any purpose other than to show propensity to commit the crime. *People* v. *Cole* (1963), 29 Ill. 2d 501, 503.

In *People* v. *Wilson,* (1970), 46 Ill. 2d 376, at pages 380 and 381, this court stated: "In each case it must be determined from the facts as to whether the evidence of other crimes is so closely connected with the main issue that it tends to prove the accused guilty of the crime for which he is being tried. (*People* v. *Tranowski,* 20 Ill. 2d 11.) The appellate court correctly noted that defendant's defense was that he had no knowledge or control of the narcotics, and the evidence of the sale was, therefore, admissible to show defendant's knowledge, motive, and intent in the possession of narcotics. Therefore, the evidence of the other crime of sale of narcotics was needed to refute the defendant's contention that he had no knowledge of the narcotics that were found in the apartment and that they belonged to one of the other adults present."

With respect to the defendant herein, however, proof of his various acts months prior to the shootings for which he was being tried went to the issues of malice, motive and criminal intent, which are elements of the crime of murder. *People* v. *Dewey* (1969), 42 Ill. 2d 148.

In *People* v. *Dampher* (1963), 28 Ill. 2d 136, at page 138, this court stated:

> "The malice which is an essential element of the crime of murder may be express or implied. Malice will be implied if, at the instant of the assault, the accused is actuated by a wanton and reckless disregard of human life."

Prior assaults on the victim also have been held to be relevant. (*People* v. *Griswold* (1950), 405 Ill. 533.) The break into Candace's home in July, 1967, was admissible evidence as tending to throw light on the intention of the defendant. (*People* v. *Rongetti* (1930), 338 Ill. 56.) The acts of the defendant on December 3, 1967, when the three women were shot, speak adequately for themselves. As the court stated in *People* v. *Lehman* (1955), 5 Ill. 2d 337, 342: "Evidence of other crimes is objectionable 'not because it has no appreciable probative value, but because it has too much.' (1 Wigmore, Evidence (3d ed. 1940), sec. 194.) The law distrusts the inference that because a man has committed other crimes he is more likely to have committed the current crime. And so, as a matter of policy, where the testimony has no value beyond that inference, it is excluded.

We conclude, therefore, that the proof of other acts in the nature of criminal offenses was introduced by the State to show the defendant's malice toward Colleen Mulcahy, Claudia Daubenspeck and Candace Mulcahy Shell, and to show his criminal intent. Such evidence was competent, and it was not error to admit it.

The defendant urges finally that giving the instruction on motive, which reads: "Motive is that which prompts a person to act. The State is not required to prove a motive for the commission of the crime charged," constituted a third trial error; that it is particularly so in view of the

fact that the prosecutor commented in final argument on motive, contrary to the I.P.I. Committee Note which reads: "See *People* v. *Dore,* 339 Ill. 415, 419-420, 171 N.E. 554, 556 (1930); *People* v. *Corder,* 306 Ill. 264, 267, 137 N.E. 845, 847 (1923); *People* v. *Enright,* 256 Ill. 221, 233-235, 99 N.E. 936, 941 (1912). However, in the *Enright* case the Illinois Supreme Court observed (256 Ill. at page 234, 99 N.E. at page 941), 'If the People claim that a motive existed inducing the commission of the act it must be proved, and, like any other circumstance, cannot be inferred * * *.'' Accordingly, if the People adduce evidence tending to prove a motive and the prosecutor argues the circumstance of motive to the jury, this instruction should *not* be given." (Ill. Pattern Jury Inst.—Criminal, No. 3.04 (1968). By virtue of the substance of the Committee Note, the defendant argues that the instruction should not have been given.

In *People* v. *Enright* (1912), 256 Ill. 221, at 234, the court stated: "In a criminal prosecution the People are required to prove the commission of an act forbidden by the law and to prove it beyond a reasonable doubt, but they are never required to prove a cause or reason that induced the accused to commit the act if without such proof the evidence is sufficient to show that the act was done by him. If the accused committed the act, the question whether he had a motive, or what it was, is immaterial. Evidence tending to show the existence or non-existence of a motive is admissible and is frequently important to be considered in connection with the other evidence in the case, and although the People are under no obligation to show a motive for the commission of a criminal act they may do so. If the People claim that a motive existed inducing the commission of the act it must be proved, and, like any other circumstance, cannot be inferred, but as they are not required to show any motive a jury should not be informed that

failure to show it tends to prove that the crime was not committed."

The instruction in question accurately stated the law, and had the State not introduced proof of acts and offenses of the defendant from which motive or intent could be inferred the instruction would have been proper. The prosecutor's comment during final argument on the defendant's motive, as exhibited in the proof of his other offenses, was improper, since use of the instruction is intended where the State has not attempted to prove motive. Comment by the State on the motive which caused the defendant to commit the offenses was obviously improper and constituted error.

The trial of the case at bar was a long one which was hotly contested and tempers ran high. When we consider all the circumstances of this case, we find that the record is free from reversible error.

While an accused is entitled to a fair trial and his rights must be zealously guarded by court and counsel, a reversal is not indicated because of some error during the trial unless it reasonably appears that the jurors, or at least some of them, have been influenced or prejudiced to the extent that they cannot be fair and impartial. (*People* v. *Malmenato* (1958), 14 Ill. 2d 52, 65.) In the case at bar, the evidence against the defendant was overwhelming.

In *People* v. *Murphy* (1916), 276 Ill. 304, in considering the matter of trial errors and reversals therefor, this court stated at page 324: "Plaintiff in error could not reasonably expect another or different verdict at the hands of another jury. It should not be and is not the policy of this court to reverse a judgment merely because error has been committed, unless it appears that real justice has been denied thereby or that the verdict of the jury or the judg-

ment of the court may have resulted from such error. There is no such showing in this record, and the judgment of the circuit court is affirmed."

Therefore, the judgment of conviction of the defendant is affirmed, and the cause is remanded for resentencing the defendant to a sentence other than death on the murder charges, and to resolve the conflict which appears in the common-law record and report of proceedings herein with reference to the minimum sentence of the defendant on the attempted-murder charge and to enter an appropriate sentence on the attempted-murder charge.

Affirmed and remanded, with directions.

APPENDIX B

III.

THE DEFENDANT WAS PREJUDICED BY THE STATE'S CONTINUOUS INTRODUCTION OF EVIDENCE OF SEPARATE AND DISTINCT CRIMES DURING THE TRIAL.

Obviously, not being satisfied with the proof of its case, the State embellished its prosecution by continuous introduction of evidence of prior, distinct and unrelated crimes committed by the defendant.

The crime charged occurred in early morning hours of December 4, 1967, and the State in its case in chief brought in before the jury evidence that bore no relationship to the events of that evening. In the first instance the State introduced evidence that in July, 1967, some 4 months before the morning in question, a man dressed in disguise entered the apartment, which was the scene of the murders, through a rear window and held the Mulcahy family at bay with a gun for a number of hours. This person allegedly told the Mulcahy family that he was hired to kill them. This person was identified by Candace Mulcahy Shell, the ex-wife of the defendant, as the defendant. Although the defendant was arrested 3 days later for this offense, charges were dropped in court by the Mulcahy family. (Abst. 30). Next in the line of distinct offenses which prejudiced the defendant in his trial for the offense of December 4 was the testimony of an incident on November 2, 1967, one month prior to the crimes charged in the instant case whereby the defendant is alleged to have met his ex-wife and her girl friend in a cocktail lounge and that while at that lounge he struck his ex-wife. (Abst. 31). Further, the girl friend, one Arlene Niemiec, testified that she was in that lounge

on November 2, 1967, with Candace Mulcahy and that the defendant asked her if Candace could leave with him and then when she responded that it was up to her to decide, the defendant punched her in the jaw with his fist. (Abst. 20).

Not being satisfied with that poison, the State also put into evidence that during the conversation with the defendant on the night in question, that the defendant was accused by the 2 deceased persons and his ex-wife of trying to drag Colleen Mulcahy into a car. (Abst. 33).

Further, the State, for reasons best known to itself, called a Chicago robbery detective to the stand to testify that he knew Phillip Manzella in Chicago, that he brought him back from Texas in May, 1970, and that the defendant is the person whom he brought back. Such testimony could only have been elicited for the purposes of showing the jury that the defendant was well known to a robbery detective in Chicago prior to May of 1970. (Abst. 66). Other witnesses had already established that the defendant was the same person who was arrested in Mexico and brought back to Chicago. (Abst. 47, 64).

It is well settled law that evidence which tends to show that an accused committed crimes or acts of misconduct which are distinct and are entirely unrelated to the one for which he is being tried is both incompetent and prejudicial. *People* v. *Donaldson,* 8 Ill. 2nd 510; *People* v. *Rivas,* 5 Ill. 2nd 556.

In the instant case, the acts in July regarding the invasion of the victim's home is so unrelated in time to the offense which allegedly occurred in December to have denied the defendant his right to a fair trial. Furthermore, the incident with his ex-wife's girlfriend, Arlene Niemiec, took place in a tavern a month before in which she was

allegedly struck by the defendant could have no way have aided the jury in determining whether he was the one responsible for the acts of December 3, 1967. All that evidence could have done was given the jury the impression that the defendant had a propensity toward criminal acts against women and was therefore responsible for crimes in December. Any evidence which tends to show nothing but a defendant's propensity to commit the crime charged is incompetent and prejudicial and the introduction of such evidence requires a remandment for a new trial. People v. *Rivas, supra.*

In *People* v. *Sterankovich,* 313 Ill. 556, 145 N.E. 172, the Illinois Supreme Court reversed the conviction where the State introduced in a murder trial evidence that the defendant made a remark about killing other persons on the same night that he was accused of killing another. The court held that introduction of that evidence was error and remanded the case for new trial. In *Brom* v. *The People,* 216 Ill. 148, 74 N.E. 790, the State introduced evidence that the defendant had a fight with another person just shortly before he had a fight which was fatal to the deceased. The court held that it was error in that it did not aid the trier of fact in deciding who was the aggressor in the fight with the deceased and reversed the conviction. The fact the defendant in this case may not have gotten along with his ex-wife may be admissible to show his attitude but evidence of an incident occurring six months before in which the charges were so lightly taken that the alleged victims dropped the criminal charges which were brought can in no way guarantee the defendant a fair trial.

And what was Officer Riccio's testimony all about except to show that the defendant was a person "known to the police", who therefore must be an "evil and criminally disposed person"? There was no need for any other wit-

nesses to identify the defendant as being the same person who was brought back from Mexico. The F.B.I. Agent and the Sheriff from Texas had already established that and Officer Riccio added nothing to the case but the venom which the State sought to use as a substitute, for legal, competent proof.

Every person, be he a saint or a sinner, be he good or bad, be he guilty or not, is entiteld to a fair and impartial trial by a jury. This was denied to the defendant. We cannot stress too many times the closeness of the case. Because of the gross and sordid facts brought out about the deaths of the deceased and the attempt murder of the ex-wife of the defendant one might tend to overlook the paucity of proof against the defendant. The only witness who accuses him of the offense is his ex-wife with whom there was admitted difficulties. In such a close case and in a case where the jury set the penalty at death the errors cited above can in no way be considered harmless. While the death sentence must be reversed one can see that a lengthy sentence would be imposed by the trial court in lieu of the death penalty if this conviction were to be affirmed. The defendant under those circumstances is entitled to a trial free of error and free of the extraneous, prejudicial, and inflammatory evidence as was introduced by the State in this case. All your Appellant asks, is a new trial free from such error.

APPENDIX C

IN THE

Supreme Court of Illinois

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. PHILLIP MANZELLA, Defendant-Appellant.	Appeal from the Circuit Court of Cook County, County Department, Criminal Division. — Honorable Daniel J. Ryan, Judge Presiding.

PETITION FOR REHEARING

Now comes the Defendant-Appellant, Phillip Manzella, by and through his attorneys Harry J. Busch and Patrick A. Tuite, and petitions this Honorable Court for a rehearing in the above-entitled cause and in furtherance of that petition states as follows:

The Court in affirming the conviction of the defendant-appellant ruled that the evidence of prior threats and in-

cidents with the victims of the crime was admissible to show his mental state toward those people. The Court held in its opinion in the instant case "With respect to the defendant herein, however, proof of his various acts prior to the shooting for which he was being tried went to the issue of malice, motive and criminal intent, which are elements of the crime of murder."

The Court then went on to hold "We conclude, therefore, that the proof of other acts in the nature of criminal offenses was introduced by the State to show the defendant's malice toward Colleen Mulcahy, Claudia Daubenspeck, and Candice Mulcahy Shell, and to show his criminal intent. Such evidence was competent, and it was not error to admit it." Nowhere in the opinion does the Court answer the contention made by the defendant that it was error to have admitted the evidence that he struck Arlene Niemeic which striking had nothing to do with his motive or intent toward the deceaseds or his former wife. The Court mentions the Niemeic striking in its recitation of the facts at the beginning of the opinion but fails to answer the contention of the defendant that such evidence was inadmissible.

The Court correctly held that notwithstanding the lack of objection it should consider the contention of the defendant regarding these other offenses under its authority of Rule 615(a) of the Supreme Court Rules regarding substantial error on appeal. The Court recognized and discussed the issues regarding prior acts toward the deceaseds and the ex-wife of the defendant and overruled them. The Court, however, did not consider the issue of the acts toward Arlene Niemeic, a non-victim and a witness for the prosecution. The Appellant cited cases where this Court on other occasions has held that it is reversi-

ble error to admit into evidence crimes against persons other than the victim in the trial of the defendant.

Specifically, there is *People* v. *Scott*, 52 Ill. 2d 432, 288 N.E. 2d 478 where this Court held that in the trial for the murder of one person it was error to establish the defendant broke his own wife's jaw since the effect would be to depict the defendant as a wife beater. This Court as well in *People* v. *Kowalski*, 332 Ill. 167, 163 N.E. 399 held that threats made to the brother of the victim were not admissible in the trial for the killing of that victim. Also, as early as *Brom* v. *The People of the State of Illinois*, 216 Ill. 148, 74 N.E. 790 this Court held that the introduction of evidence that the defendant had a fight with someone else prior to the fight he had with the deceased which caused the deceased's death was inadmissible in that it did nothing to aid the trier in fact as to deciding the issues in the case. Later, in *People* v. *Sterankovich*, 313 Ill. 556, 145 N.E. 172 this Court reversed the conviction where the State introduced in a murder trial that the defendant made a remark about killing other persons on the same night he was accused of killing the deceased. The Court granted a new trial there.

In the instant case the State introduced in evidence the fact that defendant struck another woman in a bar more than a month before the events which allegedly led to the death of his former sisters-in-law and the attempt of the life of his former wife. Whether or not the defendant struck his ex-wife's girlfriend in a bar was totally immaterial to the issues at hand and the Court in writing its opinion did not even discuss this very serious question.

WHEREFORE, your Petitioner respectfully asks this Court to grant his petition for rehearing so that he may have all the issues properly raised in his appeal decided

by this Court and for this Court to follow the existing Illinois law that the evidence of striking or causing injury to someone other then the deceased in a murder case is reversible error and should remand his case for not only resentencing, but for a new trial.

Respectfully submitted,

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